

REMARKS

Examination on the merits is respectfully requested in light of the foregoing amendments and following remarks.

1. Status of the Claims

Claims 1-2, 11-23, 32-44, and 46-49 stand pending. Claims 1-2, 11-23, 32-44, and 46-49 stand rejected. Claims 3-10, 24-31, and 45 stand previously canceled.

Upon entry of the present amendments, Applicants cancel claims 1-2, 11-23, 32-43, and 47-49. Applicants amend claim 46 to more precisely recite the claimed subject matter. Support for the amendments can be found at least, for example, from the claims originally filed and previously presented. Applicants submit that no prohibited new matter is introduced by entry of the present amendment. Cancellation of and amendments to the claims have been made without prejudice to or disclaimer of the subject matter contained therein. Applicants reserve the right to file a continuation and/or divisional on any subject matter canceled by way of amendment.

2. Status of the Drawings

Applicants respectfully request status as to the acceptance of the drawings as filed with the Office's next communication.

3. Acknowledgement of Information Disclosure Statement

Applicants note with appreciation the acknowledgement of the Information Disclosure Statement (IDS) filed April 4, 2008.

4. Rejection of the Claims Under 35 U.S.C. § 102

The Office rejects claims 1-2, 11-23, 32-44, and 46-49 under 35 U.S.C. § 102(a) or (b) as allegedly being anticipated by any of the following six references:

- 1) R1: JP 2002-180082 (English Abstract only) allegedly discloses a structured lipid having an omega-3 fatty acid in the second position, its use in foods and for preparing a composition having a lipid improving action;
- 2) R2: WO 02/06505 (Abstract) allegedly discloses triglycerides with polyunsaturated fatty acids in the sn-2 position and their use in foods;
- 3) R3: Kawashima et al. allegedly discloses the production of foods with lipid improving functions containing triglycerides with polyunsaturated fats in the sn-2 position and saturates in the sn1/3 positions (Abstract and page 611);
- 4) R4: Namal et al. allegedly discloses a food oil compositions which have lipid improving function containing triglycerides having omega 3 and omega 6 fatty acids in the sn-2 position (page 803);
- 5) R5: Yoshida et al., discloses food oil compositions from fish which have a lipid (improving function which comprises structured lipids having polyunsaturated fatty acids in the sn-2 position (Abstract); and
- 6) R6: WO 03/004667 allegedly discloses a triglyceride having a polyunsaturated fatty acid in the sn-2 position and its use in foods (Abstract).

R1-R5 are allegedly § 102(b) references, while R6 is allegedly a § 102(a) reference. The Office maintains the prior anticipation rejection, alleging that the claims as amended remain anticipated. Office Action at page 4.

Applicants traverse the rejection to the extent it applies to the amended claims. For prior art to anticipate a claim, it must disclose each and every element of the claim explicitly or inherently. The fact that a certain property possibly is present in the prior art is insufficient to establish the inherency of such a property. *See In re Rijckaert*, 9 F.3d 1531, 1534, 28 U.S.P.Q.2d 1955, 1957 (Fed. Cir. 1993).

Claims 44 and 46 recite, *inter alia*, that the food composition is ingested by an adult in a daily dosage of 0.001 to 20 g in terms of the amount of the poly-unsaturated fatty acid. None of the cited references, R1 through R6, discloses such elements. Furthermore, the Office fails to provide any evidence to demonstrate that such an element is necessarily present in any of the

cited references. Claims 44 and 46 are thus novel over cited art, because not all claim elements are disclosed, explicitly or inherently.

Accordingly, Applicants respectfully request withdrawal of the anticipation rejection and allowance of claims 44 and 46.

5. Rejection of the Claims Under 35 U.S.C. § 112, Second Paragraph

5.1. Claims 2, 11-21, 43, and 46-48

The Office rejects claims 2, 11-21, 43, and 46-48, alleging lack of antecedent basis for “lipid-improving agent.” The Office alleges that claims 2, 11-21, 43, and 46-48 recite “the lipid-improving agent,” while the base claim 1 recite “a lipid-improving agent.” Office Action at page 4. Upon entry of the present amendments, claims 2, 11-21, 43, and 47-48 stand canceled, mooting the rejection. Applicants amend claims 46 to depend from claim 44, which recites a food composition. Accordingly, the rejection of claim 46 is moot. Applicants respectfully request withdrawal of the rejection, and claim 46 allowed.

5.2. Claims 43 and 46-48

The Office rejects claims 43 and 46-48, alleging lack of antecedent basis for the term “composition,” which is not present in the base claim. Office Action at page 5. Upon entry of the present amendments, claims 43 and 47-48 stand canceled, mooting the rejection. Applicants amend claim 46 to depend from claim 44, which recites a food composition. The rejection of claim 46 is therefore moot. Applicants respectfully request withdrawal of the rejection, and allowance of claims 43 and 46-48.

5.3. Claims 18-21 and 39-42

The Office rejects claims 18-21 and 39-42, alleging lack of antecedent basis regarding the function of the lipid-improving agent. *Id.* Upon entry of the present amendments, claims 18-21 and 39-42 stand canceled, mooting the rejection. Accordingly, Applicants respectfully request withdrawal of the rejection.

5.4. Claims 12-13, 33-34, and 47

The Office rejects claims 12-13, 33-34, and 47, alleging improper Markush language. *Id.* Upon entry of the present amendment, claims 12-13, 33-34, and 47 stand canceled, mooted the rejection. Accordingly, Applicants respectfully request withdrawal of the rejection.

6. Double Patenting Rejection

The Office provisionally rejects claim 44 on the ground of non-statutory obviousness-type double patenting as allegedly being unpatentable over claims 19-25 of co-pending U.S. Application No. 10/485,456 [hereinafter “the ‘456 application”]. Office Action at page 5.

The Office is reminded that claims 19-25 of the ‘456 application stand withdrawn.¹ Accordingly, the provisional obviousness-type double patenting rejection is moot. Applicants respectfully request withdrawal of the rejection and allowance of claim 44.

¹ See non-final Office Action for the ‘456 application, dated December 9, 2008, page 2 (“claims 2-12 and 15-27 and 32-34 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected subject matter, there being no allowable generic or linking claims.”) (emphasis added).

CONCLUSION

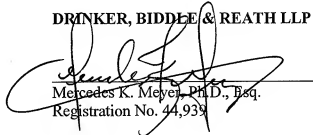
Should the Office have any questions or comments regarding Applicants' amendments or response, please contact Applicants' undersigned representative at (202) 842-8821. Furthermore, please direct all correspondence to the below-listed address.

In the event that the Office believes that there are fees outstanding in the above-referenced matter and for purposes of maintaining pendency of the application, the Office is authorized to charge the outstanding fees to Deposit Account No. 50-0573. The Office is likewise authorized to credit any overpayment to the same Deposit Account Number.

Respectfully submitted,

DRINKER, BIDDLE & REATH LLP

Dated: September 28, 2009


Mercedes K. Meyer, Ph.D., Esq.
Registration No. 44,933

CUSTOMER NO. 055694
DRINKER, BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Tel: (202) 842-8800
Fax: (202) 842-8465